Minnesota Wetland Conservation Act

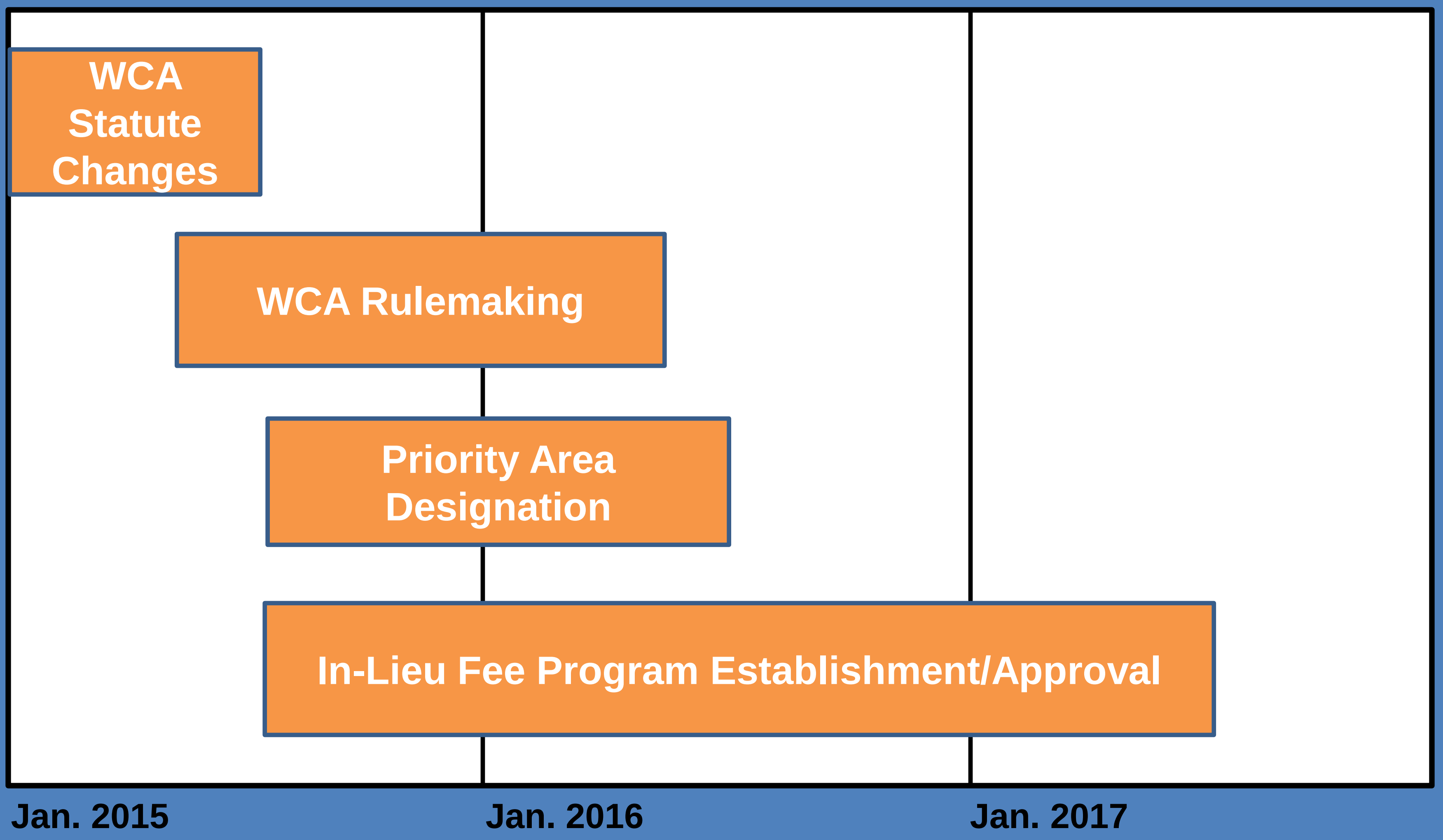
Stakeholder Input Process for Program Changes

October 27, 2014

Top 5 Stakeholder Priorities

1) Alternative Options for Compensatory Mitigation within NE MN Watersheds.
2) Wetland Mitigation Siting.
3) In-Lieu Fee Program.
4) Wetland Mitigation Search Criteria.
5) WCA and CWA Section 404 Consistency.

Projected Implementation Timelines



In-Lieu Fee Programs

Brief Overview of Federal Mitigation Rule Requirements

Differences Between Banks & ILF

- Mitigation banks:
  - Public or private sponsor
  - Site secured & mitigation initiated in advance of debits
  - Single or multiple project sites
  - Corps has no authority over bank expenditures

- In-lieu fee programs:
  - Sponsor is government or non-profit conservation organization
  - Fees usually received before securing/implementing project
  - Multiple project sites
  - Corps approves project funding

Drawbacks of ILF programs

- Risk of mitigation not being provided
- Potential for migration of functions and services
- ILF project failure may result in substantial loss of aquatic resource acreage or function
- Temporal lag between permitted impacts and ILF project implementation

ILF Sponsors

- <u>Eligibility</u> “a governmental or non-profit natural resources management entity” [332.2]
  - “…*operate explicitly in the pubic interest, rather than to serve the needs of investors*…” [FR 73, 19614]

- <u>Qualifications</u> of the sponsor to successfully complete the type(s) of mitigation project(s) proposed, including past experience [332.8(d)(2)(vi)]

ILF Instrument Includes:

33 CFR 332.8(d)(6):

- Service area(s)
- Accounting procedures
- Provision stating legal responsibility
- Default and closure provisions
- Reporting protocols
- Compensation planning framework
- Advance credits
- Method for determining fees and credits
- Description of in-lieu fee program account
- Any other information required by DE

ILF Instrument: Service Area

33 CFR 332.8(d)(6)(ii)(A)

- Service area: Geographic area within which the ILF program is authorized to provide compensatory mitigation credits.

- ILF program may have multiple service areas, but impacts & compensatory mitigation must be accounted for by service area.

ILF Program Account
33 CFR 332.8(i)

- ILF program account funds may only be used for:
  - "*selection, design, acquisition, implementation and management of ILF compensatory mitigation projects*"
  - Except for a "*small percentage*" that can be used for administrative costs
    - Amount approved by Corps in consultation with IRT
    - Specified in the ILF program instrument
    - Current range of 5% to 20%

ILF Program Account

33 CFR 332.8(i)

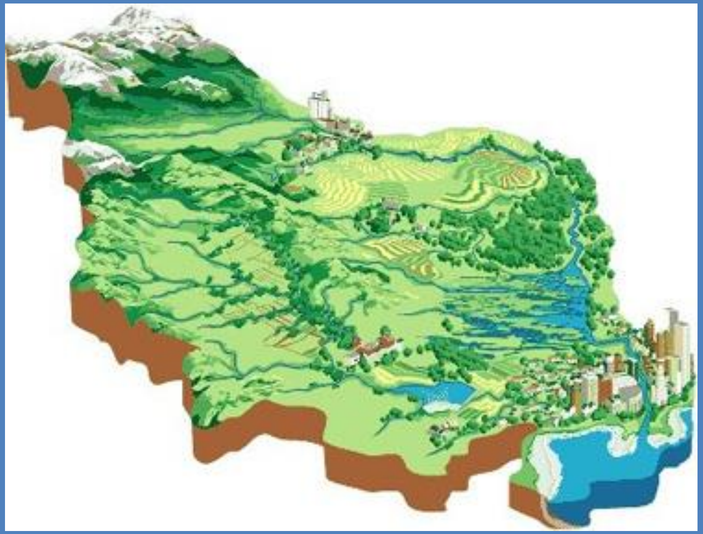
- Corps responsible for project approval
  - Corps may approve alternative compensatory mitigation if ILF project not implemented within required time frames
- Annual reports
  - Fees collected, funds expended
  - List of permits using ILF program
  - Credit balances, by service area
  - Account expenditures
- Program audit

Legal Responsibility *33 CFR 332.8(d)(6)(ii)(C)*

- Instrument must state legal responsibility for compensatory mitigation lies with sponsor once a permittee secures credits
  - Identify parties responsible for implementation, performance, and long-term management of projects
  - Documentation to DE

The Compensation Planning Framework (CPF) is a tool for strategic selection of mitigation projects

Objective: a mechanism to identify sites that meet aquatic resource needs in watershed



Guides selecting, securing, and implementing compensatory mitigation projects

- “Essentially a watershed plan”
- “Must support a **watershed approach**

Compensation Planning Framework

- Components:
  - Service area (watershed-based)
  - Analysis of historic aquatic resource loss and current condition
  - Threats to aquatic resources
  - How threats are addressed
  - Aquatic resource goals and objectives
  - Prioritize mitigation projects
  - Use of preservation
  - Description of stakeholder involvement
  - Long-term protection and management
  - Evaluation and reporting

ILF Program Advance Credits
33 CFR 332.8(d)(6)(iv)(B)

- Requires approved instrument.
- Limited number (cap) specified for each service area in the instrument.
- Available for sale prior to being fulfilled in accordance with mitigation project plan.
- As projects produce ***released*** credits, ***advance*** credits are fulfilled and available again.

ILF project implementation

- Land acquisition and improvements must be initiated by 3rd growing season after first advance credit is secured by permittee

ILF Program Advance Credits
33 CFR 332.8(n)

- Number of advance credits based on:
  - Compensation planning framework
  - Service area size
  - Resources available to program
  - Sponsor's past project performance
  - Financing needed for mitigation projects
  - Other considerations

Existing ILFs may have released credits

Where Program

- Exceeded mitigation obligations in some service areas

- Credits meeting performance standards

- <u>Credits needed for program obligations</u>

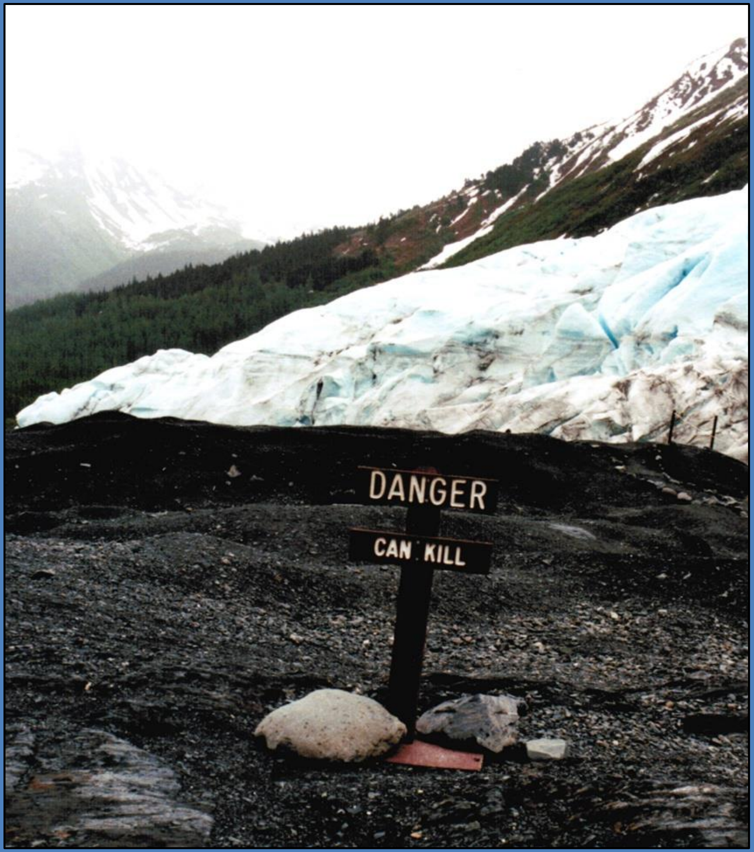
Released credits

Fee Schedule
332.8(d)(6)(iv)(B)

- Credit costs determined by the sponsor
  332.5(o)(5)
- Cost per credit must be based on:
  - Expected costs
  - Full cost accounting, including contingencies
- Fees may also be based on:
  - Type of aquatic resource credits being purchased
  - Location of compensation project
  - Size of impacts

Additional ILF Requirements

- Mitigation plan
- Credit release schedule
- Financial assurances
- Site protection
- Reporting protocols
- Default and closure
- Long-term management



Financial Assurances
33 CFR 332.3(n)

- Amount determined by DE
  - May allow for alternate mechanism
- MS Land Trust, KY DFWR - conventional
- VA ARTF
    - 20% of full implementation costs set aside
    - Stewardship when monitoring phase over
- Alternate mechanism – NC EEP
    - Letter of commitment from NCDENR
    - No financial assurances required for mitigation projects

Reporting Protocols
33 CFR 332.8(d)(6)(ii)(E)

- Monitoring reports - 332.6(c)
- Credit transaction notification - 332.3(l)(3)
- Annual program reports
  - Program account (financial) reporting -332.8(i)(3)
  - Ledger (credit) reporting - 332.8(q)(1)
- Annual financial assurances and long-term management funding report - 332.8(q)(3)

Default and Closure
33 CFR 332.8(d)(6)(ii)(D)

- Specific ILF projects and/or overall program operations
- Corps can take “appropriate action” - 332.8(o)(10):
  - Adaptive management
  - Decrease available credits (or suspend sale)
  - Require alternative mitigation
  - Make a claim on financial assurances
  - Terminate agreement

Considerations for a MN ILF

Cost Considerations in Establishing the Fee

- Project Planning, Design, and Coordination
- Land Value and Easement Purchase
- Construction
- Monitoring and Credit Release
- Long-Term Maintenance and Stewardship
    - ❖ Long term costs are currently not adequately accounted for.

Long Term Maintenance and Stewardship

Implementation: All mitigation (project-specific, banking, or ILF) must invest a percentage of the value of credits in a long-term growth account.

The account could take two forms:

1. A privately managed interest-bearing endowment (e.g. the National Fish & Wildlife Foundation); or
2. A State established and run investment fund.

Long Term Maintenance and Stewardship

Factors affecting fee calculation.

1) Monitoring/inspections – frequency, method, and costs.

2) Maintenance – frequency and average cost of repairs.

3) Ownership responsibilities – property disputes, drainage rights, violations of easement conditions, etc.

4) Contingency - safety factor to account for unforeseen events, risk, etc.

5) Inflation.

6) Average rate of return on invested funds.

Two Primary Methods to Complete Projects

1) Easement Acquisition. The project is completed by the program sponsor (application, plan development, construction oversight, monitoring, credit release, etc).

2) RFP. The project is completed by a third party under contract with the sponsor. Payments are based on credits obtained.

- Each has pros and cons.
- The BWSR Road Program uses some of both.

Mitigation Cost Estimates
BWSR Road Program and Bank Sales

- 2013 RFP process resulted in contracts with 4 private banks for credit development.
  - Approximate average cost = **$28,000/credit**.
- 2013 easement acquisition process resulted in 3 projects where BWSR will develop the credits.
  - Approximate average cost = **$25,000/credit**.
- 2014 private bank sales data.
  - Reported statewide average cost = **$27,872/credit**.

❖ *These estimates do not include costs of long-term maintenance and stewardship.*

Calculation of Fees

- More detailed analysis is needed, but a **preliminary "ballpark" estimate** is:

$28,000 credit establishment costs

\+ long term maintenance costs

\+ inflation

\+ contingency

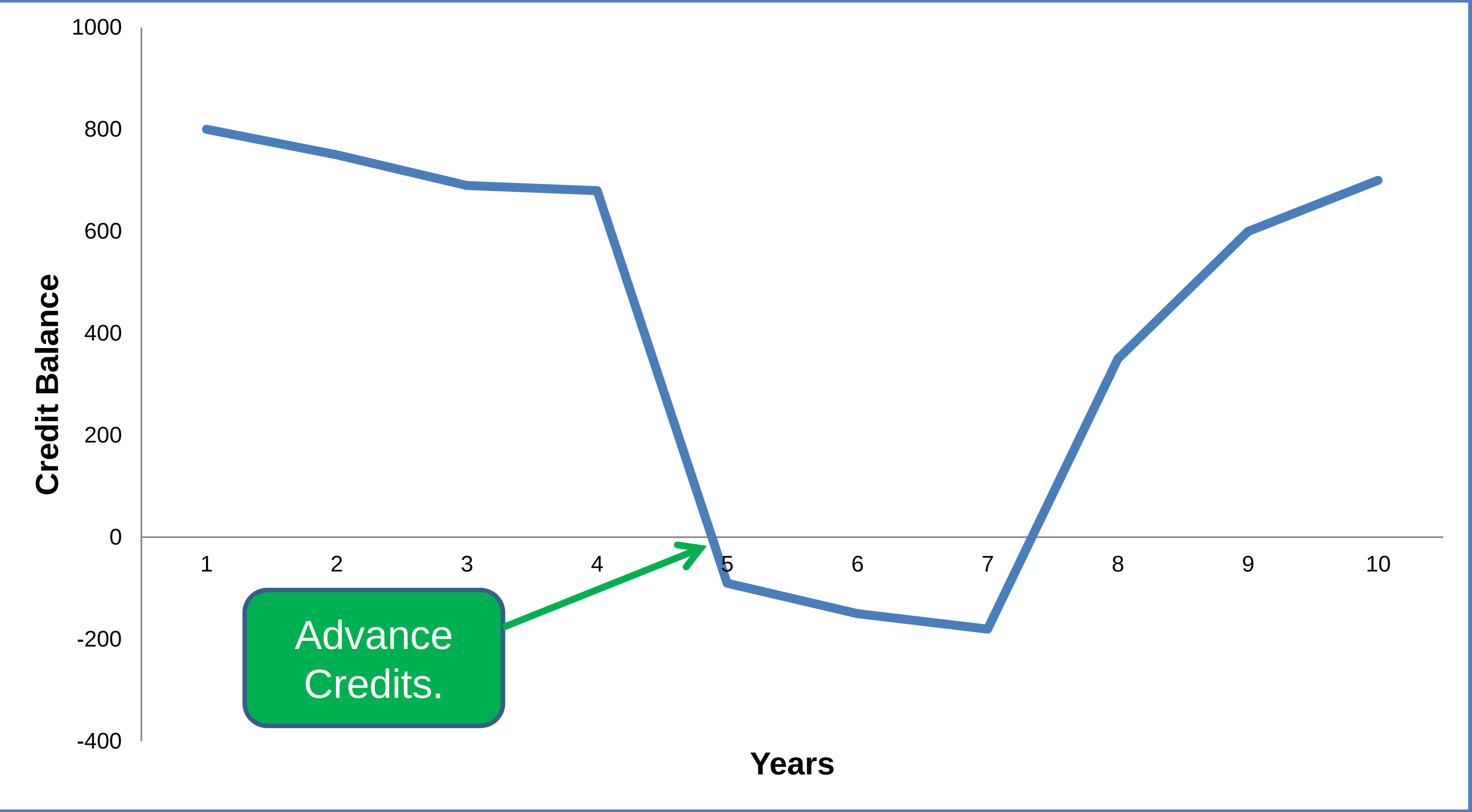
=$32,000 to $38,000 (in 2014 dollars)

- ❖ This estimate has not yet been analyzed to determine if the long-term maintenance component will generate enough interest to support long-term activities.
- ❖ This is a "statewide" estimate based on recent projects completed. The actual fee will vary depending on BSA and location in the State.

ILF Program “Start-up” Funding

- Federal Rules require the mitigation project begin within 3 years. This presents challenges for targeting.
- Some have expressed concern over obtaining wetland replacement after the impacts have occurred (risk).
- The availability of funding is necessary to take advantage of many mitigation opportunities.
- <u>Start-up funding addresses all of these issues.</u> The program would act more as a “banking/ILF hybrid,” using the “start-up” funding as a revolving loan.

Example of ILF "Hybrid" Program with Revolving Loan Fund



Potential Implementation of a MN ILF

- Structure as a “hybrid” banking and ILF program.
- Focus first on mitigation in NE, including alternative actions.
- ILF only an option when bank credits not reasonably available in the watershed/BSA (or available with a penalty).
- Funding is necessary for the start-up/banking components.

Related Issues

- Need for consistent requirements for all mitigation (ILF vs. Banking vs. Project Specific). Differences create unfair incentives and disincentives.

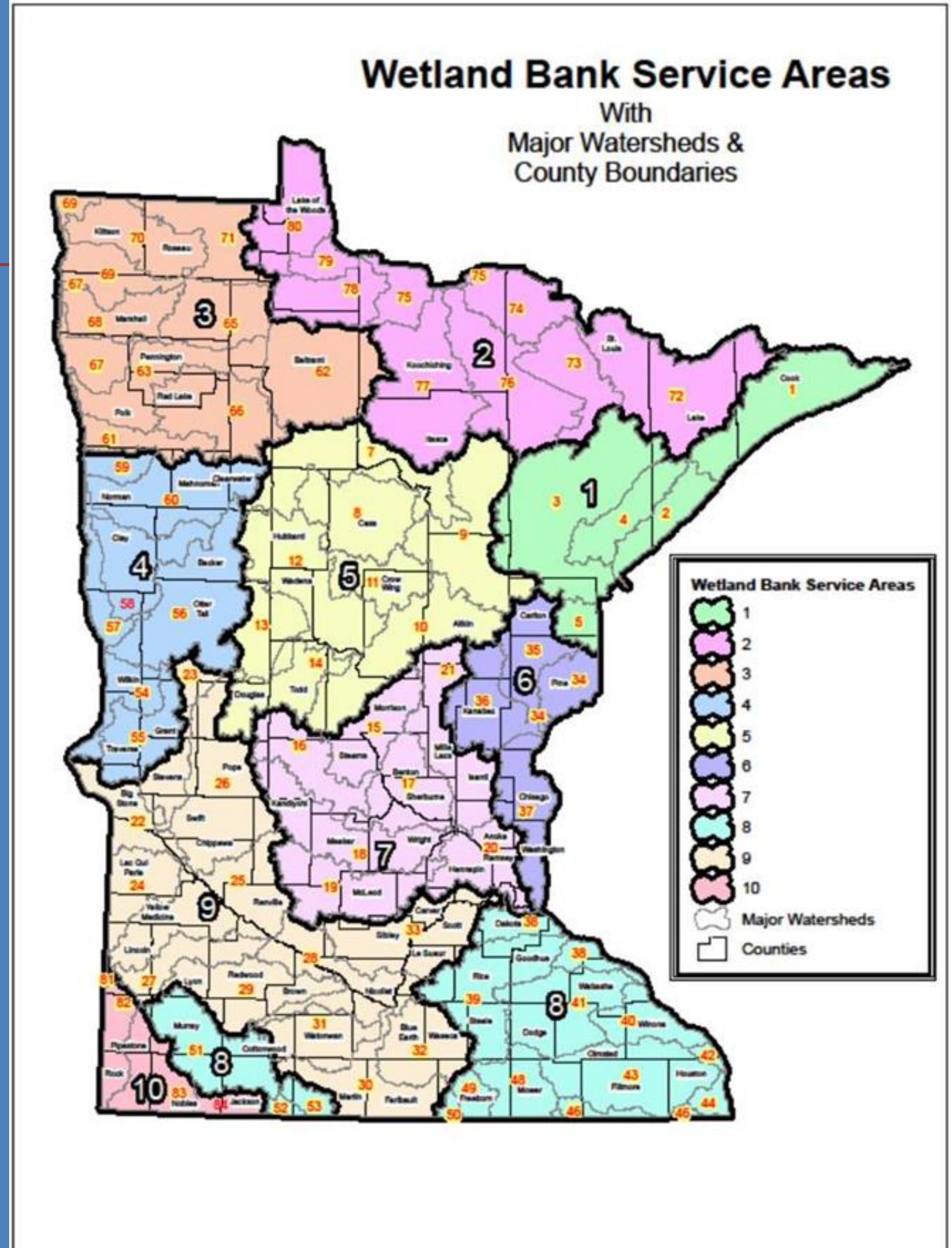
1. Technical standards and credit allocation
2. Long-term protection mechanism
3. Fees
4. Process and level of scrutiny

Legislative and Rule Implications

- Clarify ILF authority, including the ability to charge, hold, and access appropriate fees to be used <u>only</u> for ILF program implementation.
- Flexibility in siting criteria.
- Ability to purchase property when necessary.
- Funding.
- Establish specific program requirements in Rule (and Federal ILF program instrument).
- Establish consistent mitigation requirements in Rule.

Geographic Extent of Program

- Should an ILF hybrid program only be available for impacts in BSAs 1 & 2?
- What about BSAs 5 and 6?
- Greater than 80% areas?
- Statewide?



Thank You!

- Post-meeting comments can be sent to:

  david.weirens@state.mn.us